SUPREME COURT, U. S.

Supreme Court of the United States

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OCTOBER TERM, 1966.

No. 1112

WILL FOSTER,

Petitioner,

versus

LYKES BROS. STEAMSHIP CO., INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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MAY IT PLEASE THE COURT:

The petition raises no issue which warrants review. There is no undecided federal question involved nor is this Court being asked to resolve a conflict between the circuits. The District Court, on petitioner's own deposition, found no genuine issue as to any material fact and granted summary judgment. The Court of Appeals for the Fifth Circuit affirmed.[1] Petitioner asks this Court to review the facts despite its repeated pronouncements that certiorari will not be

[1] *Will Foster vs. Lykes Bros. Steamship Co., Inc.*, 368 F. 2d 326 (5 Cir. 1966).

granted simply to review the evidence below.[2] We submit the petition is inappropriate and should be denied.

Petitioner was employed by respondent as a longshoreman. On February 23, 1962, he and the other members of his gang were loading cargo aboard the SS ZOELLA LYKES.[3] Large boxes containing household goods had previously been stowed in the forward half of the lower hold.[4] To complete the stowage the longshoremen began stacking smaller boxes of cargo on top of the boxes of household goods.[5]

Petitioner was stowing cargo on top of a box of household goods in the forward end[6] of the hatch when the longshoreman operating the winch caused a load of cargo to strike the ship's coaming.[7] Some boxes were dislodged from the load and fell into the hold.[8] Petitioner saw the boxes falling and jumped down from the box on which he was standing.[9] He successfully avoided the falling cargo but claims to have sprained his ankle in jumping.[10]

Respondent paid petitioner compensation to which he was entitled under the Longshoremen's and Harbor

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[2] *General Talk. Pictures Corp. vs. Western El. Co.*, 304 U.S. 175 (1938); *United States vs. Johnston*, 268 U.S. 220 (1925); *Southern Power Co. vs North Carolina Public Service Co.*, 263 U.S. 508 (1924).

[3] Depo. p. 5.

[4] Depo. p. 13.

[5] Depo. pp. 11, 13.

[6] Depo. p. 11.

[7] Depo. p. 15.

[8] Depo. pp. 15, 16, 17.

[9] Depo. p. 17.

[10] Depo. pp. 14, 26.

Worker's Act,[11] which affords him his exclusive remedy as against his employer. Nonetheless, petitioner then brought this suit against respondent, his employer, claiming damages. We submit that this suit, in contravention of Section 5 of the Act, should not be maintained at all. However, reserving that important point, petitioner, at the very least must show that his injuries were caused by unseaworthiness.[12] This he has not done. The District Court found no evidence of unseaworthiness and entered summary judgment in respondent's favor. The Court of Appeal affirmed.[13]

Petitioner testified unequivocally that his injuries were solely the result of the winch operator's failure to raise the load high enough,[14] not, as claimed in the petition, because petitioner happened to be working on top of cargo previously stowed in the hold, not because of any alleged inverse loading procedure, not because of any alleged violation of safety regulations, not because of any lack of ingress or egress, not because of any obstruction of the winch operator's view and not because of any defect in the ship's winch or cargo gear.

Petitioner's own testimony is that his injury resulted solely from the winch operator's failure to raise

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[11] 33 U. S. C. 901-950, and particularly Section 905.

[12] *Neal vs. Lykes Bros. Steamship Co., Inc.*, 306 F. 2d 313 (5 Cir. 1962); *Puddu v. Royal Netherlands S. S. Co.*, 303 F. 2d 752 (2 Cir. 1962), *cert. denied*, 371 U. S. 840 (1962); *Spinelli vs. Isthmian S.S. Co.*, 326 F. 2d 870 (2 Cir. 1964), *cert. denied*, 377 U. S. 935 (1964).

[13] *Will Foster vs. Lykes Bros. Steamship Co., Inc., supra.*

[14] Depo. pp. 16, 26, 28.

the load high enough to clear the coaming.[15] Petitioner testified:

> "A. He (the winch operator) didn't have the load high enough. He swung there—he didn't have the load high enough. He thought it was high enough but it hit the side of the coaming and knocked the box off." (Parenthetical material supplied.)[16]
>
> * * * *
>
> "Q. There was nothing wrong with any of the ship's equipment—that is, the winch, the gears, the wire cables, the cargo, nothing wrong with the boxes themselves?
>
> A. Not that I know—only that box fell.
>
> Q. Do you know why it fell?
>
> A. It hit the side of the coaming—knocked it off the board."[17]

Petitioner's invocation of *Reed vs. Yaka*[18] does not create a right of action where none exists, nor does it create an issue of unseaworthiness where the fact finder and the appellate court found none,[19] nor does it convert a case in which certiorari is not appropriate into a case where it is. Unlike *Yaka*, this is a direct suit by a longshoreman against his employer and a vessel owned by the employer. *Yaka* involved a suit against an independently owned vessel whose owner impleaded her bareboat charterer, the actual operator, who had expressly indemnified the

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[15] Depo. pp. 16, 18-19.
[16] Depo. p. 16.
[17] Depo. pp. 26, 28.
[18] 373 U. S. 410 (1963).
[19] *Will Foster vs. Lykes Bros. Steamship Co., Inc., supra.*

owner.[20] The suit was not against the employer and no judgment was given the employee against the employer.

Congress has provided a workmen's compensation remedy to the petitioner as against the employer, which remedy is exclusive.[21] Respondent paid petitioner the compensation to which he was entitled under the Longshoremen's and Harbor Worker's Act. The Act being applicable, it is petitioner's exclusive remedy. There are no exceptions whatsoever to the exclusive nature of the Act nor the slightest basis for arguing that the employer is any less the "employer" because he is a shipowner.

The record reflects no violation of the Safety and Health Regulations for Longshoring.[22] In fact, the particular regulations cited by petitioner are wholly inapplicable. We are not dealing here with men or cargo falling from a temporary landing platform,[23] nor from the edge of a hatch section,[24] nor from other stowed cargo,[25] nor from a skeleton deck,[26] nor does this case involve two gangs working in the same hatch on different levels.[27] This is purely and simply a case of a longshoreman jumping out of the way of a falling box and spraining his ankle in doing so. It is not a case of unseaworthiness.

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[20] *Reed vs. S.S. Yaka,* 183 F. Supp. 69, 70 (ED.Pa. 1960).
[21] 33 U. S. C. 905.
[22] 29 C.F.R. 1504 *et seq.*
[23] 29 C.F.R. 1504.32.
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*
[27] 29 C.F.R. 1504.34.

Petitioner likewise had no criticism of his work area nor of the loading procedure. He testified that the usual procedure for loading was followed,[28] that he frequently climbed on top of boxes of household goods,[29] and that he hadn't noticed anything wrong with the way cargo was being brought into the hold during the day.[30]

Petitioner's testimony reveals that there was ample means of ingress and egress. The entire after half of the hold was open.[31]

The ship's hatch covers were folded completely back[32] and it was physically impossible for the covers to have obstructed the winch operator's view.[33]

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[28] Depo. p. 8.
[29] Depo. p. 14.
[30] Depo. p. 15.
[31] Depo. p. 13.
[32] Depo. p. 20.
[33] Affidavit of Louis G. DeBlois.

The evidence presented to the District Court showed conclusively that there was no evidence of unseaworthiness. The Court of Appeals for the Fifth Circuit, after a full study of the record, affirmed. Petitioner now asks for a third review of the record. We submit that the decisions below were fully supported by the record and that certiorari is completely inappropriate and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, William E. Wright, a member of the bar of this Court do hereby certify that copies of the foregoing brief have been served upon petitioner by mailing same to petitioner's counsel of record, Charles R. Maloney, Esq., 816 Richards Building, New Orleans, La. 70112, first class mail, postage prepaid, at New Orleans, Louisiana on this ... day of April, 1967.

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WILLIAM E. WRIGHT.